No. 09-13-00441-CV No. 09-13-00434-CV

IN THE COURT OF APPEALS

NINTH DISTRICT OF TEXAS

at

BEAUMONT, TEXAS

MARCELINO RODRIGUEZ, DONNA JEAN FORGAS and LINDA MARIE WILTZ GILMORE,

Appellants,

VS.

BEAUMONT INDEPENDENT SCHOOL DISTRICT, WOODROW REESE, TERRY D. WILLIAM, JANICE BRASSARD, GWEN AMBRES, and ZENOBIA RANDALL BUSH, in their respective official capacity as Trustees of Defendant Beaumont Independent School District,

Appellees.
IN RE MARCELINO RODRIGUEZ, DONNA JEAN FORGAS and LINDA MARIE WILTZ GILMORE, Relators

APPELLANTS' AND RELATORS' REPLY TO APPELLEES' BRIEF

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TABLE OF CONTENTS

BISD'S 1 ST ISSUE	
Mandamus is Available.	1
BISD'S 2 nd REPLY ISSUE	5
D.C. Court's Partial Dismissal Order Was Not Appealable	5
BISD'S 3 rd , 4 th & 5 th REPLY ISSUES	8
Section 2.082	8
General, Not a Special Election	11
No Evidence of Ability to Apply, Then Run in Election as	
Unlawfully Ordered August 15, 2013	12
Federal Injunction Prevented Appellants from Acting	
until After August 20, 2013	15
Nothing is Moot	
BISD'S 6 th & 7 th REPLY ISSUES	18
Fear of Future Federal Suit Based on Retained	
Expert's Post-election Order Irrelevant Opinion	18
CONCLUSION	21

AUTHORITIES

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Buskey v. Oliver, 565 F. Supp. 1473 (M.D. Ala. 1983)
Ffrederiksen v. City of Lockport, 384 F.3d 437 (7th Cir. 2004)
Harper v. Virginia Dep't of Taxation, 509 U.S. 86 (1993)
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Plump v. Riley, 2009 U.S. Dist. LEXIS 59542(M.D. Ala. July 13, 2009)
Shelby County v. Holder, 570 U.S, 33 S.Ct. 2613 (2013) 5-9, 19
United States v. U.S. Smelting Refining & Mining Co., 339 U.S. 186 (1950) 8
Univ. of Tex. v. Camenisch, 451 U.S. 390 (1981)
Federal Rules:
FED. R. CIV. P. 54(b)
Texas Case Law:
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In re McAllen Med. Ctr., Inc., 275 S.W.3d 458 (Tex. 2008, orig. proceeding) 3, 4
Perkins v. Ingalsbe, 347 S.W.2d 926 (Tex. 1961)
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Swain v. Wiley College, 74 S.W.3d 143 (Tex. App. – Texarkana 2002, no pet.) 10
T. D. Little v. Alto Independent School District of Alto, Cherokee County, 513 S.W.2d 886 (Tex. Civ. App. – Tyler, 1974, writ dism., w.o.j.)

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Tex. Educ. Code § 11.053
Tex. Elec. Code § 1.005(18)
Tex. Elec. Code § 1.005(6)
Tex. Elec. Code § 2.052
Tex. Elec. Code § 2.053
Tex. Elec. Code § 2.082
Tex. Elec. Code § 273.061
TEX. ELEC. CODE § 273.081
Tex. Elec. Code § 41.004(a)
Тех. Gov'т Code § 22.225(a)

TO THE HONORABLE NINTH COURT OF APPEALS:

On October 9, 2013, Appellees Beaumont Independent School District ("BISD", Woodrow Reese, Terry D. William, Janice Brassard, Gwen Ambres and Zenobia Randall Bush filed "Appellees' Brief' in No. 09-13-00434-CV addressing therein in a combined fashion both Relators' Petition for Writ of Mandamus, No. 09-13-00441-CV, and Appellants' Brief, No. 09-13-00434-CV. Relators and Appellants reply as follows:

BISD'S 1ST ISSUE

Mandamus is Available

First, BISD offered *no* evidence (e.g., affidavits, documents, etc.) to support its opposition to Relators' well-supported Petition for Writ of Mandamus, and hence BISD failed to raise any issue of relevant fact in opposition thereto.

Next, BISD erroneously argues mandamus is inappropriate because Relators allegedly have an *adequate* remedy at law by way of their interlocutory appeal from the District Court's denial of their request for *temporary* injunctive relief. BISD's argument, like so many, ignores reality and the law.

In addition to original mandamus jurisdiction, Tex. Elec. Code § 273.081, this Court also enjoys mandamus authority to correct an abuse of discretion committed by a District Court, for example, where it failed, like here, among other abuses, to apply properly or at all the applicable law to the uncontested facts before it. *Thomas v.*

Miller, 906 S.W.2d 260, 262 (Tex. App. – Texarkana 1995, orig. proceeding) ("a failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion and may result in appellate reversal through mandamus); State v. Walker, 679 S.W.2d 484 (Tex. 1984) (order dissolving temporary injunction was abuse of discretion).

Under the somewhat unique circumstances of this case, denial of Relators' requested mandamus relief would without question fail to serve the very reason the Texas Legislature adopted Tex. Elec. Code § 273.081 in the first instance. *See In re Bailey*, 975 S.W.2d 430, 432 (Tex. App. – Waco 1998, *orig. proceeding*) ("the Legislature has broadly extended our mandamus jurisdiction to resolve election questions which, as here, *are usually time-sensitive*") (emphasis added).

Significantly, the District Court's decision on Appellants' request for *temporary* injunctive relief and mandamus¹ was *not* by any stretch a decision on the merits of any of claims for relief Appellants advanced below. *Vaughn v. Intrepid Directional Drilling Specialists, Ltd.*, 288 S.W.3d 931, 937 (Tex. App. – Eastland 2009, *no pet.*) ("merits of the controversy are not presented" in temporary injunction setting). BISD expressly objected to a trial on the merits then being had, precluding the possibility

The District Court further abused its discretion by denying, and additionally by even ruling on, Appellants' request for District Court mandamus without a trial on the merits thereon. **Appellants' Brief**, Appendix, Tab A, p.11 ("Plaintiffs' request[] for mandamus relief [is] hereby denied[.]").

of a final determination of the merits before key election dates approached and the November 5, 2013 election was in fact had. **HT** (Hearing Transcript) (Vol. 2, Pg. 14, Ln. 24-25) (Dunn: "[W]e would object to hearing the case on the merits.").

Indeed, the District Court itself recognized in its decision denying the temporary relief and mandamus relief, that although no trial on the merits had occurred, its decision would "moot" Appellants' request for District Court mandamus and permanent injunctive relief. **CR 66**. Under the circumstances of this case, Appellants' interlocutory appeal of the denial of their application for election-related *temporary* injunctive relief clearly does not offer an adequate remedy at law. And here, the benefits of mandamus review do not come anywhere close to being outweighed by any detriment, which BISD has not in any event shown. *See In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 462, 468-69 (Tex. 2008, *orig. proceeding*).

An interlocutory appeal, even an accelerated one, is clearly not adequate where the party could nevertheless be deprived of a substantial right. *See In re Kansas City S. Indus.*, *Inc.*, 139 S.W.3d 669, 670 (Tex. 2004); *Iley v. Hughes*, 311 S.W.2d 648, 652 (Tex. 1958). For example, deprivation of substantial rights would occur if waiting for an appeal would vitiate or severely compromise a party's ability to present a viable claim or defense at trial. *See Walker v. Packer*, 827 S.W.2d 833, 843 (Tex.1992, *orig. proceeding*) (trial court's ruling is an "effective denial of a reasonable opportunity to

develop the merits of his or her case, so that the trial would be a waste of judicial resources").

The fact that an accelerated appeal is available does not *ipso facto* preclude election related mandamus relief. *See Republican Party of Texas v. Dietz*, 940 S.W.2d 86, 93 (Tex. 1997) (mandamus appropriate to review temporary injunction which required a political party to provide booth at its convention to a specific interest group within the party); *De Alejandro v. Hunter*, 951 S.W.2d 102, 106 (Tex. App. – Corpus Christie 1997, *orig. proceeding*) (court reasoned that despite the would-be mayor's right to an accelerated appeal, the issue of who is to occupy as elected office was a circumstance justifying mandamus relief).

In the present case, by the time Appellants' could obtain any form of permanent injunctive or mandamus relief below from the District Court at a trial on the merits, the November 5, 2013 election, including early voting to start October 21, 2013, will have passed. As the Texas Supreme Court recently confirmed, mandamus is "not limited to cases where there was 'no other legal operative remedy,' but [can] issue when 'other modes of redress are inadequate or tedious' or when mandamus affords 'a more complete and effectual remedy." In re McAllen Medical Center, Inc., 275 S.W.3d at 467 (emphasis added). Here, under the circumstances, and moreover considering the policy of Tex. Elec. Code § 273.081, there is no question that

mandamus affords "a more and complete effectual remedy," if not the only effective remedy. *Id.* BISD's argument is without merit.

BISD'S 2nd REPLY ISSUE

D.C. Court's Partial Dismissal Order Was Not Appealable

For the first time since the United States Supreme Court issued *Shelby County* v. Holder, 570 U.S. _____, 33 S.Ct. 2613 (2013) BISD finally has begrudgingly acknowledged that the decision has retroactive implication. Specifically, BISD states:

Though it is true that the Supreme Court ... in *Shelby County* ... on June 25, 2013 ... found the Section 5 coverage formula unconstitutional, Relators cannot avail themselves of that ruling because this order was not timely appealed before *Shelby County* was issued and therefore was final. It is true that Supreme Court opinions have some retroactive effect but only as to orders then pending or on appeal. See Harper vs. Virginia Dep't of Taxation, 509 U.S. 86, 97 (1993).

Appellee's Brief, p.20 (emphasis added).

Although selectively addressed solely in connection with *res judicata*, ² BISD's faulty and legally unsound argument in fact underpins almost its entire opposition, an opposition void of Texas law supporting any of BISD's illegal conduct, including, 1) its Board's April 29, 2013 express cancellation and annulment of the election it

The facts and law before this Court in *In re Rodriguez* have not changed. *Barnett v. Maida*, 523 S.W.2d 325 (Tex. Civ. App. – Beaumont 1975, writ ref'd n.r.e.) (applying "appellate" res judicata) ("It is the established law of this state that courts may take notice of their own records and a former judgment may be held to be conclusive in a subsequent action when the record shows a judgment rendered in a cause involving the same subject matter between the same or practically the same parties[.]"); TEX. GOV'T CODE § 22.225(a) ("A judgment of a court of appeals is conclusive on the facts of the case in all civil cases.").

ordered February 21, 2013, 2) the Board's post-election order redistricting, and 3) its August 15, 2013 ordering of a new election from some, but not all, of those districts on August 15, 2013. All of these actions were taken under the cover of the then pending, albeit unconstitutional, D.C. Action, and more significantly, without any State law authority whatsoever. *Shelby County*, 570 U.S. _____, 133 S.Ct. 2612; *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993).

In making its argument, BISD, with misplaced confidence, argues that the D.C. Court's May 10, 2013 partial dismissal based on lack of federal jurisdiction³ became final and binding, and somehow remains binding, because Appellants, Intervenors below, did not effect an appeal therefrom before *Shelby County* retroactively struck on June 25, 2013, thus somehow authorizing BISD under State law to take the actions it took contrary thereto.

Because BISD is wrong, the vast majority of BISD's opposition argument goes out the window. BISD incorrectly advises this Court that the D.C. Court's May 10, 2013 order, dismissing only one of several then pending BISD Section 5 claims, was an appealable order, which it was not.

See Ffrederiksen v. City of Lockport, 384 F.3d 437, 438 (7th Cir. 2004) (explaining that dismissal for lack of subject matter jurisdiction is not with prejudice, but the "jurisdictional disposition is conclusive on the jurisdiction question" such that "the plaintiff cannot re-file in federal court").

This is no doubt a federal three-judge court can enter a final judgment on one of several pending Section 5 claims, provided however that it meets the requirements of FED. R. CIV. P. 54(b). *See Plump v. Riley*, 2009 U.S. Dist. LEXIS 59542 **17-19 (M.D. Ala. July 13, 2009) (Section 5 case). In the instance case, however, the D.C. Court's order was unappealable, containing no FED. R. CIV. P. 54(b) certification, and lacking even the required express direction of the court that judgment be entered thereon. *Plump*, 2009 U.S. Dist. LEXIS 59542 *19 (court may "direct entry of a final judgment as to one or more [claims] ... *only if the court expressly determines that there is no just reason for delay*") (emphasis added).

Contrary to BISD's contention, the appellate time clock never started to run on the D.C. Court's May 10, 2013 partial order of dismissal, and therefore, certainly could not have expired before *Shelby County* swept *retroactively* away Section 5's enforceability, along with the D.C. Action and BISD's unconstitutional federal cover and its proffered excuse for its Board's actions clearly unlawful and void under Texas law.

Next, how a federal *preliminary* injunction of any sort can ever represent a final judgment on the merits belies all logic and rudimentary principles of civil procedure. It cannot. *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) (preliminary injunction's "limited purpose" is "preserv[ing] the relative positions of the parties

until a trial on the merits can be held"); *United States v. U.S. Smelting Refining & Mining Co.*, 339 U.S. 186, 198-99 (1950) (order granting preliminary injunction is not a final judgment on the merits).

Despite BISD's *Shelby County* retroactivity admission, it continues to urge this Court to the ignore the effects of judicial pronouncement of the U.S. Supreme Court and thereby give judicial recognition and effect to the unconstitutional actions of the D.C. Court. To do so, however, would unconstitutionally and impermissibly burden BISD, its voters and harm and penalize Appellants having vested State law rights, turning both *Shelby County* and the 10th Amendment to the U.S. Constitution on their respective heads.

BISD'S 3rd, 4th & 5th REPLY ISSUES

Section 2.082

BISD does not, of course, address any State laws supporting any of the actions at issue, not one, whether or not under the unconstitutional cover of the D.C. Court.

The D.C. Court's unconstitutionally issued *preliminary* injunction temporarily enjoined the actual conduct of the election BISD ordered February 21, 2013, and only until such time as a trial on the merits could be had on BISD's Section 5 declaratory judgment claims regarding the very election BISD had ordered, including the Map 7B election districts implemented and used with respect thereto. No trial was had.

The temporary delay occasioned by the unconstitutional order was just that – and under *Shelby County* and *Harper* can be no more that – a delay in the holding of the election BISD ordered February 21, 2013, and which it had no State law authority to otherwise cancel, whether directly or indirectly, and by whatever means.

For whatever the reason, BISD gave itself little or no leeway regarding the timing of obtaining Section 5 preclearance and its next trustee election, but nevertheless its Board set the election train in legal motion, a train that State law directs must reach its destination, and that BISD had no authority to derail. Tex. ELEC. CODE § 2.082; *Perkins v. Ingalsbe*, 347 S.W.2d 926 (Tex. 1961); *State v. Goodwin*, 5 S.W. 678 (Tex. 1887).

It was BISD, not the unconstitutional, void and legally nugatory act of the D.C. Court, that expressly derailed, or to use BISD's phraseology—"terminated or formally annulled—the election train that its Board ordered February 21, 2013. *Appellees' Brief*, p.23. It was BISD that again redistricted, also derailing and cancelling permanently that election train. It was also BISD alone that acted to order a new and different election train to head down different tracks. Although BISD contends it had no idea what to do—"once a called election does not occur—BISD had *no power* under State law to do what it did. Tex. Elec. Code §§ 2.082, 2.052 & 2.053.

These unlawful acts are void, and hence could be given no legal effect by either the District Court below, likewise by this Court. *Tex. Highway Comm'n v. Tex. Ass'n of Steel Importers, Inc.*, 372 S.W.2d 525, 530 (Tex. 1963); *Swain v. Wiley College*, 74 S.W.3d 143, 146 (Tex. App. – Texarkana 2002, *no pet.*); *City of Fort Worth v. Lillard*, 272 S.W. 577, 580 (Tex. Civ. App. – Fort Worth 1925), *aff'd*, 294 S.W. 831 (Tex. 1927) (all acts done by a political subdivision of the State beyond the powers conferred upon it are void).

While Yett v. Cook, 281 S.W. 837 (Tex. 1926) and Castillo v. State ex rel. Saenze, 404 S.W.2d 97, 97-98 (Tex. Civ. App. – San Antonio 1966, no writ) may arguably support the "rescheduling" of an election that was not possible to hold by circumstances outside the control of the jurisdiction, they do not stand for the proposition that BISD could "toss the baby out with the bath water," that is, cancel contrary to Tex. Election Code § 2.082, wholesale the election it earlier had ordered based on established election district lines, and after closure of all applicable candidate filing deadlines and with candidates having vested rights. See Castillo, 404 S.W.2d at 97-98 (discussing only the "time and place" of the election); Yett, 281 S.W. 837 (discussing only "[s]tatutues fixing "the time" for holding an election).

If anything, these two old cases BISD cites, considered with the other applicable Election Code authority, merely permit a jurisdiction to *reschedule* to

another date an election previously ordered but not actually held on a prior date. These cases, coupled with the Election Code, would not, however, empower a jurisdiction to destroy, annul and cancel its previously ordered election – after candidates's rights vested – to enable the jurisdiction to conduct an entirely different election at the said later date to the ouster and harm of the former candidates. Tex. Elec. Code §§ 2.082; 2.052; 2.053.

To quote BISD – "voting laws 'should be followed as near as practicable" – a principle the Board itself wholesale ignored in myriad ways to cancel and annul the Board's earlier ordered election, i.e., its April 29, 2013, express cancellation and annulment of the election order February 21, 2013, its subsequent redistricting and implementation the new election districts, and thereafter by the ordering of a wholly different trustee election. *Appellees' Brief*, p.46 (quoting *Wood v. State ex rel. Lee*, 126 S.W.2d 4, 6 (Tex. 1939)); *City of Univ. Park v. Van Doren*, 65 S.W.3d 240, 248 (Tex. App. – Dallas 2001, *pet. denied*) (holding that municipal jurisdiction could not accomplish indirectly what it could not do directly under power-limiting Texas statute).

General, Not a Special Election

BISD also erroneously relies upon Tex. Elec. Code § 41.004(a) as authority empowering it to act as it did. The statute, on its face, applies only to a "special

election." TEX. ELEC. CODE § 41.004(a). The Election Code defines a "special election" as "an election that is not a general election or a primary Election." TEX. ELEC. CODE § 1.005(18). A "general election" is "an election, other than a primary election, that regularly recurs at fixed dates." TEX. ELEC. CODE § 1.005(6).

The regular election of BISD trustees to fill positions not occasioned by vacancy occur at regular, fixed intervals and thus said elections are general, not special elections, whatever the actual date of the said election. *See T. D. Little v. Alto Independent School District of Alto, Cherokee County*, 513 S.W.2d 886, 891 (Tex. Civ. App. – Tyler, 1974, *writ dism.*, *w.o.j.*) (noting clear distinction between general elections and special elections: "The [Texas] Supreme Court stated that special laws provide for special elections; special laws being those which apply to an 'individual or individuals ... of a class and not to all of a class."") (citation omitted).

No Evidence of Ability to Apply, Then Run in Election as Unlawfully Ordered August 15, 2013

The District Court below blindly adopted BISD's factually and legally baseless contention about Appellants' purported lack of harm, and BISD continues the absurdity with this Court. *Appellees' Brief*, p. 27-28 ("any one of the Relators could have filed to run" in the November 2013 election") ("Relators are not entitled to run for any office if they did not timely file paperwork to run for the November election")

Tellingly, BISD can not cite, and has not cited to this Court a *single* piece of relevant evidence below showing Appellants qualified to run for a trustee position in the wholly restructured election the Board ordered August 15, 2013. That was the whole purpose of the Board's unlawful cancellation and subsequent redistricting.

The uncontested evidence below showed that Appellants did not in fact reside in any of the new election districts that BISD on August 15, 2013 put up for election. *State v. Southwestern Bell Tel. Co.*, 526 S.W.2d 526, 528 (Tex. 1975) (abuse of discretion exists where the evidence does not reasonably support a court's conclusion). Moreover, the Board redistricted, and untimely exercised its Tex. Educ. Code § 11.053 option to keep four trustees in office, allowing only three positions for the November 5, 2013 election. Again, Appellants did not reside in any of three districts.

The District Court below plainly abused its discretion in finding and concluding that Appellants suffered no harm because they allegedly simply chose not to seek election in November 2013 for positions *not* up for election as BISD ordered on August 15, 2013.

Moreover, Appellants were before the District Court, and are now before this Court to prevent the *culmination of actual harm* to them by (1) BISD's unlawful exclusion of Appellants from a place on the ballot at the election BISD will conduct

November 5, 2013, and (2) by the Board's concomitant staunch failure and refusal to declare Appellants elected to office. Tex. Elec. Code §§ 2.02; 2.053.

This harm, however, is specifically what both Tex. ELEC. CODE § 273.081 and Tex. ELEC. CODE § 273.061 were intended to prevent. *Cook v. Tom Brown Ministries*, 385 S.W.3d 592, 600 (Tex. App. – El Paso 2012, *pet. denied*) (reversing trial court's denial of Tex. ELEC. CODE § 273.081 injunctive relief where violation of code conclusively shown); *Ramirez v. Quintanilla*, 2010 Tex. App. LEXIS 6861 (Tex. App. – Corpus Christie, Aug. 20, 2010), *pet. denied*, 2010 Tex. LEXIS 625 (Tex. Aug. 27, 2010) (temporary injunction sustained where uncontested candidate was – a "person who is being harmed or in danger of being harmed by a violation or threatened violation of this code" – where candidate would be uncontested in a general election, but jurisdiction unlawfully ordered special election whereat candidate would face a contested race). It is indeed unfortunate the District Court failed to grasp the law in this regard.

Last, while BISD continues to complain that the statutorily required, legislatively sanctioned outcome is akin to the judicial "anointment" of a candidate to elected office, its complaint is properly addressed to its creator, the Texas Legislature. See Wichita Falls State Hosp. v. Taylor, 106 S.W.3d 692, 695 (Tex.

2003) ("In Texas, the people's will is expressed in the Constitution and laws of the State.").

Federal Injunction Prevented Appellants from Acting until After August 20, 2013

Sprinkled throughout Appellees' brief are factually unsupported and legally unsound argument that Appellants' claim for temporary, election-related injunctive relief was properly denied, and that appellate election-related mandamus should be denied herein, because in a nutshell Appellants' allegedly delayed unreasonably in seeking the said relief. Total nonsense.

On the one hand BISD attempts to take cover under the D.C. Court's *preliminary* injunction, and on the other attempts to fault Appellants for not seeking State district court injunctive or appellate mandamus relief *before* the federal preliminary injunction was dismissed on August 20, 2013. **PRR 23** (Vol. 2, Pg. 57, Ln. 5-7); *Appellees' Brief*, p. 30-31 ("Relators do not explain why their case in the District Court sat still while the filing period and other election events occurred.") ("This is entirely the fault of the Relators, who could have sought the relief they seek as early as April, and as late as one month before they filed their amended petition.").

BISD's argument is disingenuous at best. BISD knows full well, and the District Court below should have known, that a State court had no authority to order any relief counter to the then pending federal injunction, including an order requiring

BISD to act on or with respect to its February 21, 2013 election order. In fact, Appellants tried, albeit unsuccessfully, before this Court. After dismissal of the D.C. Action, it took Appellants only one (1) week to act. **CR** (Pg. 32).

BISD asserts, "Candidates have filed for office, the campaign is underway and election preparations have started. Ballots have now been mailed to citizens who have requested them." *Appellees' Brief*, p.31. BISD offers *no* evidence of ballot requests or that any ballots have in fact been mailed. It offered *no* such evidence to the District Court below, and offers this Court no such evidence in response to Relators' Petition for Writ of Mandamus. Even so, to date only **two (2)** people have requested mail-in ballots, and the deadline for requesting them does not expire until October 29, 2013. *Affidavit of Thomas Nield, Sr.* Moreover, under the unlawfully ordered August 15, 2013 election, there is only one (1) contested race.

In addition, this Court has before it evidence that only three to five days are required to move from a Map 7I-based election to a Map 7B-based election, and no "new filing period" is required. *Appellees' Brief*, p.32. The candidate filing deadline for the Map7B-based election ordered by the Board on February 21, 2013, long ago closed. There is only one (1) contested race (the same candidates and race, whether under Map 7B or Map 7I), and no candidate would be tossed from the November 5, 2013 election ballot as a consequence to the shift otherwise required by law.

BISD studiously ignores that it cannot "have its cake and eat it too" under Tex. ELEC. CODE § 2.053. If there is an inability to place Appellant-Relators physically on the ballot to receive a single vote for election, for whatever reason, and although BISD has offered no proof apart from its say so, then the Board's discretion under Tex. ELEC. CODE § 2.053 is consequently eliminated by operation of statute. The Board has one choice left: It must declare the uncontested candidates – all of them, including Ambres, Neil, Rodriguez, Forgas and Glimore – elected to office according to their respective Map 7B election districts. Tex. ELEC. CODE § 2.053. Under such circumstances, the failure to do so would represent a clear and manifest abuse of the Board's discretion.⁴

Contrary to BISD's "the sky will fall argument," a Tex. Elec. Code § 2.053 declaration will *not* necessitate the advance readjustment of election district voting precincts for any of the six (6) uncontested races⁵ – simply because no votes will be cast at the election for any of the six (6) candidates, and the said election as to these

Because BISD is also conducting only one (1) contested race, the Board's TEX. ELEC. CODE § 2.053 declaration must proceed with the actual election to allow proper notice to the public that the particular uncontested elections have been cancelled by operation of law.

Concerning the one (1) contested race, BISD offered no evidence that adjustment of the voting precincts applicable to that election district race would even impact the two purported voters that have requested a mail-in ballot to date. Even if it did, BISD could simply mail a new ballot, still containing the same single contested race, to the two (2) requestors along with a brief explanatory note before the October 29, 2013 request deadline.

candidates will be cancelled by operation of law. Tex. Elec. Code § 2.053. The same is true regarding reprogramming of voting machines, etc. It simply would not be required.

Nothing is Moot

BISD asserts that "[o]nce the time for an election has come and gone, disputes about that election are moot." *Appellees' Brief*, p.29. In the present case, however, and contrary to Texas law, the election the Board ordered February 21, 2013 has still not taken place. As shown by Appellants in their Brief and herein, the issues remain live and justiciable. While BISD may have been able to "reschedule" the election it ordered February 21, 2013 because of unconstitutional delay, it had no State law power to completely abandon and forever terminate it as it did here. Those acts were void, and cannot be given any legal effect. Tex. Elec. Code § 2.082; *Perkins*, 347 S.W.2d 926; *Goodwin*, 5 S.W. 678.

BISD'S 6th & 7th REPLY ISSUES

Fear of Future Federal Suit Based on Retained Expert's Post-election Order Irrelevant Opinion

First, the District Court patently overstepped its limited temporary injunctive relief jurisdiction/duties to reach, and even more so to decide, the Section 2, VRA legality of the election districts BISD itself adopted and used in the election it set

legally in motion by February 21, 2013 Board order. *See Vaughn*, 288 S.W.3d at 937 ("merits of the controversy are not presented" in temporary injunction setting).

It also was an abuse for the District Court to rule on the merits of BISD's improper declaratory judgment claim. The District Court abused its discretion and erred by willfully allowing itself to be turned into and used as a Section 5, VRA preclearance court, something not even constitutionally allowed in and by federal courts. *Shelby County*, 570 U.S. ____ 133 S.Ct. 2612.

Section 273.061 of the Texas Election Code granted the District Court no such authority. Additionally, the Section 2, VRA issue was never raised in any of the active pleadings before the District Court. Appellants' case below clearly was not a Section 2, VRA case.

No matter how wonderful BISD touts that its expert was, or that he was handsomely compensated by the BISD taxpayers, the hired gun's Section 2 opinion concerning the election districts his client adopted and implemented in an election on February 21, 2013 were wholly irrelevant, yet admitted over continuing objection. *Vaughn*, 288 S.W.3d at 937.6

Of significance, not even preclearance of changed election districts by the U.S. Department of Justice can insulate a jurisdiction from subsequent Section 2 litigation. See Major v. Treen, 574 F. Supp. 325 (E.D.La. 1983); Buskey v. Oliver, 565 F. Supp. 1473 (M.D. Ala. 1983).

BISD's continuing attempt to convert a TEX. ELEC. CODE § 273.061 proceeding into a Section 2 against itself, or into a Section 5 pre-clearance action cannot permissibly stand, and moreover it was a clear abuse of the District Court's discretion to reach and moreover to decide the merits of something not even raised by the pleadings. *Vaughn*, 288 S.W.3d at 937 ("merits of the controversy are not presented" in temporary injunction setting).

If BISD truly had was been so concerned, it should have purchased *this* expert's opinion *before* and not after it ordered the election train in legal motion, and after allowing all lawful passengers to board it. Although stated in Appellants' Brief, this bears repeating: Permitting a post-election order *opinion*, like that offered by BISD, to authorize or somehow sanction the cancellation of that election, or to authorize post-election order redistricting, not only would run expressly contrary to Tex. Elec. Code § 2.082, but would set dangerous and unsustainable precedent undermining the very integrity and the entire stability of *all* elections held in the State. *See Edwards v. Murphy*, 256 S.W.2d 470, 473-74 (Tex. Civ. App. – Fort Worth 1953, *writ dism'd*) ("[A]ppellees, in any event, being otherwise entitled to have the election called and held, cannot be defeated in that right by the refusal of appellants to perform purely ministerial duties on the ground that in their opinion the amendment, or a part thereof, would be invalid if adopted.").

To conclude, there is vast gulf between an expert's opinion and the actual adjudication on the merits of a Section 2 claim, and such claim must be litigated fully to the merits before it can be allowed to have any legal effect whatsoever on an election, especially after its order. BISD wanted to make this a Section 2 case, but it was not and is not, and it was error for the District Court to treat it that way.

CONCLUSION

BISD makes no mention of the District Court's verbatim adoption of its proposed form of order, and for good reason. What it proposed, and therefore what the District Court adopted, as opposed to what the uncontested facts below and applicable law actually support, demonstrate a clear and manifest abuse of the District Court's discretion in denying Appellants' requested injunctive relief.

Further, Relators' factually uncontested showing of legal merit concerning their Petition for Writ of Mandamus filed herein demonstrates not only that the Petition should be granted, but further that the District Court abused its discretion below.

While BISD expresses a desire to get on with the business of "educating the community's young citizens," its Board has to date been a poor teacher indeed: "Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example If the government becomes a

lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself." Olmstead v. United States, 277 U.S. 438, 485 (1928).

RESPECTFULLY SUBMITTED.

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CERTIFICATION OF WORD COUNT

The undersigned certifies that the above word count is 5,420, excluding title pages, tables, captions and signature blocks.

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that a true and correct copy of Appellants' Brief was served on all known counsel of record on October 11, 2013, and by the noted method:

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IN THE COURT OF APPEALS

NINTH DISTRICT OF TEXAS

at

BEAUMONT, TEXAS

MARCELINO RODRIGUEZ, DONNA JEAN FORGAS and LINDA MARIE WILTZ GILMORE,

Appellants,

VS.

BEAUMONT INDEPENDENT SCHOOL DISTRICT, WOODROW REESE,
TERRY D. WILLIAM, JANICE BRASSARD, GWEN AMBRES, and ZENOBIA RANDALL BUSH,
in their respective official capacity as
Trustees of Defendant Beaumont
Independent School District,

Appellees.

IN RE MARCELINO RODRIGUEZ, DONNA JEAN FORGAS and LINDA MARIE WILTZ GILMORE, Relators

AFFIDAVIT – RELATORS' REPLY BRIEF

This affidavit is offered in support of Relators' reply made to Respondent's October 9, 2013 "Appellees' Brief" addressing the propriety of mandamus relief:

AFFIDAVIT OF THOMAS B. NEILD, SR.

THE STATE OF TEXAS

§

COUNTY OF JEFFERSON

§ §

BEFORE ME, the undersigned authority, on this day personally appeared THOMAS B. NEILD, SR., who, after being duly sworn, upon his oath stated as follows:

1. My name is Thomas B. Neild, Sr., I am over the age of eighteen (18) and am of sound mind and competent to testify in this case, and every statement in this Affidavit is true and correct and within my personal knowledge unless otherwise indicated.

2. I am a sitting Trustee for the Beaumont Independent School District ("BISD"). I have served on the BISD Board since May 2009.

3. In connection and in furtherance with my duties as a BISD Trustee, on October 9, 2013, I contacted Georgia Antoine, the BISD Board's secretary to make an official inquiry to find out how many mail in ballots, if any, had by then been requested in connection with the election BISD ordered to occur November 5, 2013 election. According to Ms. Antoine, BISD had received only two (2) requests for a mail in ballot.

4.

THOMAS B. NEILD, SR.

SWORN TO and SUBSCRIBED before me on this 10th day of October 2013.

JULIE M HANNA
Notary Public, State of Texas
My Commission Expires
August 22, 2017

ARY PUBLIC, STATE OF TEXAS

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